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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1130

FRANK PHELAN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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CITATIONS TO OPINIONS AND ORDERS BELOW.

The opinions of the trial court [Record pp. 51(a)-446(a)] are unreported.

The opinion of the Supreme Court of Pennsylvania printed in Appendix A hereto; the concurring opinion (Bell, C. J.) printed in Appendix B hereto; and the dissenting opinion (Roberts, J.) printed in Appendix C hereto, handed down September 26, 1967 are reported in 427 Pa. 265.

The order denying Petition for Reargument printed in Appendix D handed down November 24, 1967 is reported in 427 Pa. 265.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED.

1. Whether action by a State Court refusing a change of plea from guilty generally to murder to not guilty by reason of insanity and compelling defendant to go to trial where the record discloses only a stenographer's conclusion that an arraignment took place, and where the defendant, at all times, before, during and after trial insisted he did not plead guilty and was under the impression that he would have a jury trial, denied defendant constitutional due process and a fair trial as guaranteed by the Fourteenth Amendment of the Federal Constitution?

2. Whether action by a State Court denying court-appointed counsel leave to hire a special investigator and psychiatric experts and requests for continuances for preparation purposes, denied the defendant effective assistance of counsel and constitutional due process and a fair trial, as guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution?

3. Whether action by a State Court at trial on an alleged plea of guilty generally to murder at the stage of the proceedings where the court was inquiring into the degree of murder when it ruled inadmissible evidence of psychiatrists tending to prove defendant was a "psychotic", and suffering from a mental disease or defect, because of which he lacked the capacity to substantially conform his conduct to the requirements of the law which he was alleged to have violated and that he did not have the capacity to form the necessary mens rea to commit the crime of first degree murder denied the defendant a fair trial and violated the due process clause of the Fourteenth Amendment of the Federal Constitution?

4. Whether the action of a State Court in holding that the M'Naghten Rules were the only and sole tests for determining criminal responsibility denied the defendant a fair trial and constitutional due process in violation of the Fourteenth Amendment of the Federal Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are Section 1 of the Fourteenth Amendment containing the due process clause which provides:

> ". . . NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW . . ."

and the Sixth Amendment which provides:

"IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT . . . TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATIONS: AND TO BE CONFRONTED WITH THE WITNESS AGAINST HIM . . . AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

STATEMENT.

This petition stems from two death sentences imposed on your petitioner without benefit of the jury trial he demanded below and which he insisted he was constitutionally entitled to receive.

The judgment sentencing the petitioner to death was imposed by a three Judge Court in Philadelphia. The court upon a PLEA OF GUILTY GENERALLY TO MURDER determined the degree of guilt to be first degree and sentenced the defendant to death in the electric chair. THE PLEA OF GUILTY was recorded on October 26, 1964, nearly one year before the hearing fixing the degree of guilt and sentence.

Petitioner was charged with murder and conspiracy in connection with the death of Judith Lopinson and Joseph Malito who had been shot and killed on June 19, 1964, in the basement of Dante's Restaurant, Philadelphia, Pennsylvania, and confined without bail.

On July 27, 1964, while confined in the County Prison and without benefit of counsel, the petitioner informed the prison guards that he wanted to make a statement to the police. The next morning, and while still without benefit of counsel, petitioner made a full and detailed statement of his participation in the killings of Judith Lopinson and Joseph Malito.

Petitioner's statement of July 28, 1964, was interrupted to make him available to the Commonwealth as a witness at a habeas corpus hearing for Jack Lopinson (R. 211a), who was also charged with the two murders (wife, Judith Lopinson, and business partner, Joseph Malito). At that time the petitioner was again without benefit of counsel.

On August 14, 1964, more than two weeks after the statement and the Lopinson habeas corpus hearing, Attor-

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On August 14, 1964, more than two weeks after the statement and the Lopinson habeas corpus hearing, Attor-

ney John Patrick Walsh entered his appearance for the petitioner.

On October 24, 1964, the petitioner then represented by Attorney Walsh, was allegedly arraigned. A PLEA OF GUILTY GENERALLY TO MURDER was entered for the petitioner by his then attorney. The record discloses that the petitioner was never actually arraigned because the indictment was never read to him.

On July 19, 1965, petitioner filed a handwritten petition expressing disillusionment with his privately retained attorney and requested the court to "dismiss him" and to appoint other counsel. At a hearing on that petition, petitioner moved to withdraw his PLEA OF GUILTY GENERALLY TO MURDER and to be permitted to enter a PLEA OF NOT GUILTY. ("If the lawyer that put that guilty plea in has withdrawn, that should also be withdrawn" [R. 93a-94a]). On July 27, 1965, Attorney Walsh who had also petitioned the court for permission to withdraw as counsel, was allowed to withdraw [R. 86a-87a].

On August 2, 1965, the court appointed Abraham J. Brem Levy, Esquire, and John A. Papola, Esquire, as counsel.

On August 3, 1965, court-appointed counsel filed a motion for leave to retain an investigator under the Act of March 22, 1907, P. L. 31, Paragraph 1, as amended (19 P. S. 784). The purpose for the request was to enable them to adequately prepare the case for trial and to take all necessary steps to protect the legitimate interests of petitioner. The court denied the petition.

The next day counsel appealed this order to the Supreme Court. The appeal was listed for argument on September 27, 1965, in Pittsburgh, but the hearing date was changed to September 29, 1965. Counsel prepared a written brief, but on September 28th were notified that the

Commonwealth had filed a motion to quash the appeal claiming Judge Sloane's order of August 10 was "interlocutory." On October 1, 1965, counsel were notified that the appeal had been quashed. Meanwhile, on September 23, 1965, defense counsel were notified that the hearing on petitioner's PLEA OF GUILTY GENERALLY TO MURDER was listed for disposition on October 11, 1965.

Counsel then filed a motion for leave to be permitted to obtain the identity, and to interview, all witnesses who would testify or who would be available to testify against petitioner. The court denied the motion.

On October 8, 1965, counsel filed a petition to change the PLEA OF GUILTY GENERALLY TO MURDER (that had allegedly been entered nearly a year earlier, on October 26, 1964), to NOT GUILTY. In that petition is contained the following allegation:

> "14. At the time your petitioner was presented to the Court for arraignment purposes, on October 26, 1964, his mental and physical condition were such that he was unable to comprehend the nature of the proceedings or the effect thereof."

That petition simultaneously requested that the hearing ("trial") on the PLEA OF GUILTY GENERALLY TO MURDER, the purpose of which was to fix the degree of guilt and to then determine the sentence scheduled for October 11, 1965, be continued.

On the following Monday, October 11, 1965, at about 12:30 P. M., all requests for continuance and the petition for leave to change the PLEA OF GUILTY GENERALLY TO MURDER to NOT GUILTY, were denied. An immediate appeal (filed at 2:40 P. M.) was taken to the Pennsylvania Supreme Court, and an instantaneous motion to quash the appeal (because the order denying the petition was "inter-

locutory") was filed by the prosecution. One hour later (at 3:45 P. M.) counsel for defendant, the assistant District Attorney and Deputy Prothonotary George W. Dunn, Jr., were asked to and did discuss the appeal in a telephone conversation with Mr. Chief Justice Bell of the Pennsylvania Supreme Court. Counsel was in Philadelphia in Mr. Dunn's office and the Chief Justice was in Pittsburgh where the court was sitting. At 4:15 P. M. (less than two hours after this appeal was taken), the Chief Justice called the trial Court by telephone and advised, that the Supreme Court had unanimously determined that the trial court's action was "interlocutory", and that the appeal was quashed [R. 131a].

Following a day's pause occasioned by a Legal Holiday, the hearing ("trial") was resumed on the PLEA OF GUILTY GENERALLY TO MURDER. Court-appointed counsel presented (on October 13, 1965) three petitions to the court: (1) petition for mental examination of the petitioner; (2) petition for leave to withdraw the PLEA OF GUILTY GENERALLY TO MURDER and to enter a plea of NOT GUILTY on the grounds of "after-discovered evidence" including petitioner's insistence that a jury be impanelled to hear his defense [R. 153a]. During argument on these petitions (as well as before and after), court-appointed counsel repeatedly placed in issue the defendant's mental capacity at those times, at the time he allegedly committed the acts at the time he was allegedly arraigned, at the time he confessed, at the time he testified in the Lopinson matter, and at all other pertinent times continuing through the trial on the PLEA OF GUILTY GENERALLY TO MURDER. On several occasions counsel sought to have the petitioner examined either by order of the court or by psychiatrists to be retained by petitioner [R. 133a, 134a, 139a-140a, 175a-158a, 164a]. On the same day the court: (1) denied the petition

and oral motion for a mental examination and (2) denied petition for leave to change the PLEA OF GUILTY GENERALLY TO MURDER on the grounds of "after-discovered evidence" [R. 156a]. After the Commonwealth had presented its case on the degree of guilt and had rested, the court granted the petition for leave to hire an investigator. The court, however, limited the period for investigation to forty (40) hours—from 4 P. M. on October 13, 1965, until 10 A. M. on October 15, 1965. Later that same afternoon counsel by oral motion requested permission to retain, as the "investigator" a psychiatrist. This oral motion was refused [R. 322a-323a].

On October 15, 1965, the court resumed the hearing considering the degree of petitioner's guilt. At that time, counsel, in a stipulation joined in by the prosecution, made an oral motion, statement and request for leave to introduce evidence of the petitioner's mental condition. This request was denied; the testimony was ruled inadmissible [R. 337a]. The evidence in question was identified as the testimony and reports of two eminent psychiatrists who would prove inter alia: (1) that the petitioner was "psychotic"; (2) that the petitioner's defective or diseased mental condition negated his presumed ability to commit an act where malice, intent and premeditation are a necessary ingredient; (3) that at the time when the prohibited act or acts occurred, the petitioner as the result of mental disease or defect lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated, and was therefore incapable of forming the necessary mens rea to commit murder in the first degree; and (4) that consequently the petitioner was not criminally responsible for his conduct and did not "understand" in a legal, meaningful sense the proceedings then in progress or the prior proceedings: when he was arrested, questioned, indicted and allegedly arraigned, and when he testified in the Lopin-

son habeas corpus proceedings and at the trial of *Commonwealth v. Jack Lopinson.* The court overruled the motion and ruled the evidence inadmissible [R. 337a].

Thereupon, the defense rested [R. 340a]. The prosecution immediately closed [R. 340a].

On October 15, 1965, the court found petitioner guilty of murder in the first degree [R. 343a-344a].

Following a luncheon recess, the court reconvened for the purpose of determining the penalty. It was at this time that the defense was permitted to read into the record the reports of psychiatric examinations (earlier held inadmissible as to the degree of crime) made by Dr. Robert L. Leopold [R. 346a] and Dr. Kenneth E. Appel [R. 346a] who had made examinations of the petitioner in this case at the request of his then privately retained counsel (Walsh). The dates of the examinations were: Dr. Leopold on October 24, 1964, two days before Phelan was allegedly arraigned on October 26, 1964; Dr. Appel on December 23, 1964, two months after the "arraignment" and some two months before petitioner testified in *Commonwealth v. Jack Lopinson.* The court also permitted the reports of the psychiatrists who on behalf of the Commonwealth had previously examined the petitioner to be read into the record for the purpose only of determining penalty. The psychiatrists and the dates of their examinations were: (1) Dr. John G. Torney and Dr. Martin F. Hayes (August 7, 1964), Director and Neuropsychiatrist, respectively, of the Quarter Sessions Court of Philadelphia [R. 398a]; (2) Dr. Anthony S. Tornay (August 8, 1964) [R. 376a]; (3) Dr. Baldwin Longstreth Keyes (August 10, 1963) [R. 382a]; (4) Dr. D. H. Cole (September 24, 1964) [R. 370a]; (5) Dr. Norman E. Anderson (September 25, 1964) ([R. 366a].

On October 19, 1965, the court sentenced the petitioner to death in the electric chair for each killing and to one to two years for conspiracy.

REASONS FOR GRANTING THE WRIT.

1. Action by a State Court Refusing a Change of Plea From Guilty Generally to Murder to Not Guilty by Reason of Insanity and Compelling Defendant to Go to Trial on the Plea Where the Record Disclosed Only a Stenographer's Conclusion That an Arraignment Took Place, and Where the Defendant, at All Times, Before During and After Trial Insisted He Did Not Plead Guilty and Was Under the Impression That He Would Have a Jury Trial, Denied Defendant Constitutional Due Process and a Fair Trial as Guaranteed by the Fourteenth Amendment of The Federal Constitution. Appellant Was Never Actually Arraigned in This Capital Case.

It is apparent that because of a defective and incomplete transcript of an alleged arraignment on October 26, 1964, petitioner was never actually arraigned in this capital case.

In Pennsylvania "arraignment shall consist of a reading of the indictment to the defendant and calling upon him to plead thereto". Rule 317(a) of the Laws of Criminal Practice (19 P. S. 462). (See generally 21 Am. Jur. 2d § 452, specially Note 4 on page 452). This requisite has constitutional underpinnings and was not met in this case.

A "transcript" of an "arraignment" which does not transcribe fully and precisely what was verbally uttered at the hearing is either not a valid transcript or not the transcript of a valid arraignment. In this matter the pertinent record reflects only a number of questions directed by the court and the assistant district attorney to the defendant in the presence of his then privately retained counsel and a plea entered by the attorney, and then the following:

"THE COURT: Arraign the defendant.

"(Defendant arraigned at the bar of the court, pleads guilty to Bill No. 468, Murder, and to Bill No. 469, Murder)."

Because this transcript in no manner whatsoever indicates that the bills of indictment charging petitioner with murder were read to him in open court, this petitioner was never actually arraigned. The conclusion of the stenographer that appellant was "arraigned" falls far short of meeting the minimal standards of a valid arraignment transcript. Nor was this defective or incomplete transcript reformed later, if indeed reformation is lawful in a capital case.

In *Commonwealth v. Crandall,* the Superior Court of Pennsylvania in discussing this problem stated:

> "Equally lacking in merit is appellant's contention that the court below erred in dismissing appellant's petition to enlarge and correct the record. The only alleged falsifications specifically referred to in appellant's briefs are the docket entries showing that the appellant was arraigned on August 30, 1940, and that he pleaded not guilty to both bills of indictment. There is nothing to contradict the docket entries except the unsupported statement of appellant aliunde the record. To sustain this contention would be to impeach the record, and this we decline to do. *Commonwealth v. Crandall,* 145 Pa. Superior Ct. 353 at p. 358 (1941).

In our case, the stenographer was never called to explain this conclusion despite this colloquy between the Judge and the prosecutor. [R. 111a]:

> "JUDGE ALEXANDER: This happens to be the Court speaking at that time, October 26, 1964, and it is this

Court's distinct recollection, but I will ask Mr. Sprague to make a brief answer. What is your recollection, Mr. Sprague?

"MR. SPRAGUE: The bills of indictment were read in entirety at the time of the arraignment and we will have a witness if necessary to testify to that effect." Significantly, that witness never came forth.

Nor does the prosecution's statement that the bills of indictment were read to appellant reform this defective or incomplete transcript. Nor, finally, does Judge Alexander's recollection from the bench suffice, despite counsels' great respect for this jurist.

This is not the ordinary case where, after the defendant has pleaded GUILTY and then been meted out a severe sentence he changes his mind about the wisdom of having pleaded guilty. Instead, from the moment that the hearing began on petitioner's motion to dismiss privately retained counsel on July 27, 1965, and continuing through the hearing ("trial") leading inexorably to these two death sentences petitioner consistently and emphatically insisted that he had not pleaded GUILTY GENERALLY TO MURDER, that he wanted to plead NOT GUILTY, and that he always thought he would have a jury trial regardless of any technical pleas. The combination of factors identified in this connection constitute "very unusual circumstances" and were persuasive enough to prevail upon the court "To believe that Justice will best be served by submitting the case to a jury." *Commonwealth v. Scoleri,* 415 Pa. 218 at pp. 247-248; *Commonwealth v. Kirkland,* 413 Pa. 48 at p. 55.

We respectfully submit that in this case of double murder the ends of Justice would have better been served by permitting the change of plea and that the trial court abused

its discretion when it refused to do so thereby denying petitioner a fair trial and constitutional due process as guaranteed by the Fourteenth Amendment.

2. Action by a State Court Denying Court-Appointed Counsel Leave to Hire a Special Investigator and Psychiatric Experts and Requests for Continuances for Preparation Purposes, Denied the Defendant Effective Assistance of Counsel and Constitutional Due Process and a Fair Trial, as Guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution.

Petition for Leave to Hire Special Investigator and Motion to Hire Psychiatric Experts and Requests for Continuances.

When counsel were appointed they were unfamiliar with the facts and circumstances of this case except from that which they had gleaned from newspapers and other news media.

It then became counsel's professional responsibility to familiarize themselves with all of the facts and circumstances surrounding the activities of the petitioner, the Commonwealth and others in this major murder case.

At that time, they were confronted with the task of studying a voluminous record in the companion Lopinson trial (3,371 pages) and to make a determination as to whether the petitioner had been illegally induced to testify, whether he testified under the influence of drugs and the necessity of following up leads concerning the records of the Philadelphia County Prison at Holmesburg and locating and interviewing witnesses.

Confronted with this difficult task, counsel sought the court's permission to hire an investigator in order to adequately prepare the matter. This was done pursuant to

the Act of March 22, 1907, P. L. 31, as amended (19 P. S. 784).

The court denied the petition.

Having been denied the assistance of a special investigator, counsel were restricted to a study of the record in the Jack Lopinson case, the unchecked medical and other records from Holmesburg Prison and other records received from earlier counsel.

It was apparent at this point that the petitioner's mental condition was deteriorating from the time he was allegedly arraigned till the time he was called for trial on the plea of guilty generally to murder, during which time he seriously assaulted a fellow prisoner for which he was tried and sentenced to an additional prison term.

The legitimate attempt of counsel to establish a proper defense of insanity was thwarted when the court denied the use and assistance of psychiatric experts to prove such a defense.

If petitioner is entitled to court-appointed counsel, then it follows that counsel must be provided with the necessary assistance to intelligently and knowledgeably determine what course to follow and what steps to take to assure defendant a fair trial and constitutional due process. *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 7921, 9 L. Ed. 2d 799 (1963); *Massiah v. United States,* 377 U. S. 201, 12 L. Ed. 2d 246; *Bush v. McCollum,* 231 F. Supp. 560 (N. D. Texas 1964).

Beginning with *Powell v. Alabama,* 287 U. S. 45 (1932) and continuing through *Watts v. Indiana,* 338 U. S. 49 (1949), *Gideon v. Wainwright,* 372 U. S. 335 (1963), *Escobedo v. Illinois,* 328 U. S. 478 (1964) and *Jackson v. Denno,* 378 U. S. 368 (1964), the lesson is plain that denial to defense counsel access to a defendant's confession prior to trial is to deny the defendant EFFECTIVE assistance of counsel. Our situation goes much deeper than the mere

denial of a copy of a confession, but rather the denial of an opportunity to prepare any defense or for counsel to be prepared to EFFECTIVELY advise the defendant.

Throughout this case, the trial court refused counsel sufficient time and/or assistance of experts to adequately prepare a defense, thereby denying defendant constitutional due process and effective counsel as guaranteed by the Sixth and Fourteenth Amendments.

3. Whether Action by a State Court in the Trial on an Alleged Plea of Guilty Generally to Murder at the Stage of the Proceeding Where the Court Was Inquiring Into the Degree of Murder When It Ruled Inadmissible Evidence of Psychiatrists Tending to Prove a Defendant Was a "Psychotic", and Suffering From a Mental Disease or Defect, Because of Which He Lacked the Capacity to Substantially Conform His Conduct to the Requirements of the Law Which He Was Alleged to Have Violated and That He Did Not Have the Capacity to Form the Necessary Mens Rea to Commit the Crime of First Degree Murder Effectively Denied the Defendant a Fair Trial and Violated the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.

After the court refused all defense motions for assistance in the preparation of the case and continuances for purposes of preparation, it proceeded to take testimony to determine the degree of guilt. At that stage of the proceedings, counsel offered to produce evidence concerning the petitioner's defective mental condition and his inability because of that mental defect to substantially conform to the law which he is alleged to have violated, and his inability to form the necessary mens rea necessary to commit the crime of first degree murder. The court held such evi-

dence to be inadmissible, but indicated it would permit such testimony after the degree of guilt had been ascertained but only in mitigation of penalty.

This ruling denied the petitioner an opportunity to prove his mental condition at the time the alleged acts were committed, when he was arraigned and when he was compelled to go to trial, and thereby denied him a fair trial and constitutional due process because being relevant to the issue this evidence had probative value and was prima facie admissible. *McCormack, Evidence,* § 152 at 318-19 (1954); and as stated by Mr. Justice Roberts of the Pennsylvania Supreme Court in the dissenting opinion filed in this matter:

> ". . . In my view, the majority unwisely restricts the purpose for which psychiatric evidence may be admitted, and thereby binds the courts of this Commonwealth to a rule which is contrary to enlightened authority."

and then points-up that which is contained in the reports of Dr. Robert L. Leopold and Dr. Kenneth E. Appel:

> "From the psychiatric standpoint, there is no question whatsoever in our [Dr. Leopold and Dr. M. Lawrence Spoont] minds that this man is suffering from severe, chronic, progressive schizophrenia. He is impulse-ridden, delusional, hallucinatory, and without insight. We desire to stress that he is a thoroughly dangerous human being who has no control whatsoever over his own agression and who, because of his paranois [sic], can be expected to kill at any time that he is under what for him is sufficient emotional pressure.
>
> . . .
>
> "We are aware that the McNaughton [sic] formulation of criminal insanity includes only the concept of

whether a man knows the difference between right and wrong. On an intellectual level, Frank Phelan can make this distinction. It is, however, meaningless to him because such an intellectual concept is overwhelmed totally by his psychotic needs.

"Dr. Kenneth E. Appel, Emeritus Professor of Psychiatry at the University of Pennsylvania, concluded:

> "He can say the words right and wrong, he can tell the legal consequences of criminal actions, such as murder, but his pathology or sickness of mind is so strong that he is not free to act under such concepts and considerations—they are irrelevant, purely verbal and impotent before the strength of his destructive almost animalistic drive and almost delight in killing.
>
> "The diagnosis is mental disease—Severe Intense Paranoid *Schizophrenia,* in my opinion—with delusions of grandeur, persecution and compulsion to kill. (Emphasis in original.)"

In the dissenting opinion, Justice Roberts also went on to say that the evidence of the petitioner's mental condition was relevant evidence and "RELEVANT EVIDENCE IS ADMISSIBLE EVIDENCE," and in discussing the basis for the exclusion of that evidence said:

> "The M'Naghten rule, which formed the basis for exclusion of similar evidence in *Ahearn,* is nowise an evidentiary test; devised to establish a standard of the degree of mental impairment necessary to render a defendant not criminally responsible, it should not be employed to restrict the scope of relevant evidence on an entirely distinct issue, *i.e.,* specific intent to kill.
>
> "The *Ahearn* decision was, in fact, a departure from prior Pennsylvania law—a departure I could not

sanction then and cannot now. In several of the cases cited by the *Ahearn* majority on the admissibility issue, the lower court *did* permit the psychiatrist to give his expert opinion as to the defendant's state of mind. . . . In each of these cases we merely questioned the weight to be accorded such evidence and did not rule that the evidence was inadmissible.

"The vice of the majority's position is self-evident. It has been rejected in other M'Naghten jurisdictions and by the American Law Institute. So long as a specified mental state forms one of the elements of first degree non-felony murder, this Court should not deprive the factfinder of relevant, possibly probative, evidence. To ignore the contribution psychiatry can make to the reliability of verdicts is to retreat from the Twentieth Century."

Wherefore it is respectfully submitted the petitioner was denied a fair trial and constitutional due process as guaranteed by the Fourteenth Amendment.

4. The Action of a State Court in Holding That the M'Naghten Rules Were the Only and Sole Tests for Determining Criminal Responsibility Denied the Defendant a Fair Trial and Constitutional Due Process in Violation of the Fourteenth Amendment of the Federal Constitution.

From the time counsel were appointed until the petitioner was found guilty of first degree murder and sentenced to death in the electric chair, the trial court was continuously on notice that the defense contended that the petitioner was a mental defective (diseased mind) at the time of the commission of the crime, when he was formally charged with the crime; when he was allegedly arraigned,

and when he was called to trial on his alleged PLEA OF GUILTY GENERALLY TO MURDER, because of which mental defect or disease he lacked the capacity to substantially conform to the law he was charged with having violated.

The court insisted that since the petitioner had pleaded GUILTY GENERALLY TO MURDER, his legal sanity was to be determined exclusively by the formula laid down by the M'Naghten Rules, and denied all defense efforts to shed light on the petitioner's mental condition at the time of the commission of crime and when charged with and tried for the same.

The M'Naghten Rules Should Be Abolished as the Sole Test of Criminal Responsibility.

The M'Naghten Rules have plagued the administration of justice since 1843 from the time the Law Judges of England were called upon by the House of Lords to explain their conduct after the acquittal of Daniel M'Naghten who had attempted to assassinate Sir Robert Peel, Prime Minister of England, but instead mistakenly shot the Prime Minister's secretary, Drummond, and finally (with the hot breath of a frightened and hysterical Queen on the backs of their necks) came up with a formula which has encumbered the administration of the criminal law for over a century.

The history of the M'Naghten Rules has been so widely discussed, written about, interpreted, defended and condemned in the law courts, and by books, articles and discussions that there would be no point in again detailing the questions propounded by the Law Judges of England and the hysteria which brought them into being. Suffice it to say that the end result was the "RIGHT AND WRONG AND APPRECIATION OF THE NATURE AND CONSEQUENCES OF ONE'S ACT TEST" for determining criminal responsibility of per-

sons accused of crime. These rules as the sole test have fashioned a straight jacket which the criminal law administration has been wearing from that time to the present as was expressed by Mr. Chief Justice Bell in *Commonwealth v. Tyrell,* 405 Pa. at page 221. In that case, citing *Commonwealth v. Woodhouse,* 401 Pa. 242, the court said:

> ". . . Once again this court approved the M'Naghten Rule 'which was adopted as the law of Pennsylvania' (*Commonwealth v. Mosler,* 4 Pa. 264 (1846)) and has become firmly established and embedded in the law of the Commonwealth ever since."

We are acutely aware of the Supreme Court of Pennsylvania's latest expression again approving the M'Naghten Rules as the sole and exclusive test of criminal responsibility of those claiming to be mentally incompetent (*Commonwealth v. Ahearn,* 218 A. 2d 561). We think *Ahearn* can readily be distinguished from the case here under consideration.

In *Ahearn* the trial court permitted psychiatric testimony to be developed and then, and this issue is beclouded, apparently refused to consider its effect because the testimony allegedly was of a substandard quality.

The Supreme Court of Pennsylvania then characterized psychiatric testimony as being self-serving and of no value whatsoever and then held that such testimony was not admissible when the court was considering degree of crime but admissible only when penalty was being considered.

In the present case, however, the trial court flatly ruled inadmissible psychiatric testimony of mental capacity "because the law of the Commonwealth is still M'Naghten." In so doing, the court denied petitioner constitutional due process and a fair trial, because such a determination denied the petitioner an opportunity to present testimony in an effort fairly to convince the court that he was not

guilty of first degree murder. Simply put: *Ahearn* was a sufficiency of evidence decision while the present case is one of admissibility. In the law of evidence this distinction, at the trial level, is the difference of preponderance and a scintilla of evidence! In ruling this evidence inadmissible, the court must find that the offered testimony did not amount to a scintilla of relevant evidence.

The administration of the criminal law, like the administration of all other law in this enlightened age, must keep pace with the advances made in legal thinking and in the sciences if its product (dispensing justice) and its image are not to be sullied and brought into disrespect. This is precisely what the M'Naghten Rules as the sole test does.

Judge Kauffman, speaking in *United States v. Freeman,* 357 F. 2d 606 (2nd Circuit, decided February 28, 1966) referring to the development of the law said [at 606-607]:

> "As legislation proliferates and judicial decisions multiply, our criminal law daily takes on increased complexity and sophistication. Subtle distinctions are constantly drawn; more perfect refinements continue to evolve. At the same time, however, there are a small number of more basic questions which cut across the whole of this evolutionary process, questions so fundamental to the very notion of criminal justice that they must continue to be asked—and, insofar as possible, answered—if the criminal law is truly to reflect the moral sense of the community. . . ."

The M'Naghten Rules came into being (1843) when very little was known about psychiatry or psychology. Since then by adhering to M'Naghten and only M'Naghten the law has been arrested and suffered to remain in the state of knowledge prevalent as of the time the rules came into being.

Through the years there has been widespread dissatisfaction with the M'Naghten Rules as the only formula for determining legal sanity.

The late Mr. Justice Bok in a dissenting opinion in *Commonwealth v. Woodhouse,* 401 Pa. 242, at page 264 (1960) said:

> "I would abolish the M'Naghten Rule.
>
> "It is not the Act of any Legislature, it is not the decision of any court, and it is not the concept of an American mind . . . It was conceived by disaster, born of excitment, and nourished in fear. It has, however, fastened a leech upon American Jurisprudence."

He then went on to discuss the advances made in the administration of the law in other areas where mental competency was involved and concluded that all inquiries should be directed to mental health and not only to whether a man INTELLECTUALLY knows the difference between right and wrong, and INTELLECTUALLY understands the nature and quality of his acts.

The more advanced and humane legal thinkers, including the courts and the dedicated physicians to whom can be ascribed great advances in the science of psychiatry, are disenchanted with the M'Naghten Rules, and have declared it a disaster area to be further explored by the courts in an effort to develop a workable, humane, realistic and progressive formula to determine legal sanity instead of that narrow straight jacket described as the "RIGHT AND WRONG AND NATURE AND QUALITY OF ACTS TEST."

Typical of the enlightened objections to the M'Naghten Rules as the sole test of criminal responsibility are reflected by

1. Mr. Justice Bok in *Commonwealth v. Woodhouse,* observed that the courts were loathe to move against the

rules because "no satisfactory alternative has been presented", and then said, "I believe that none is needed."

2. Chief Judge Biggs in *United States v. Currens*, 290 F. 2d 761 (1961) (3rd Circuit), said the court complains that the M'Naghten Rules are still being followed even in this enlightened age:

> "Since the turn of the century great strides in the advancement of psychiatry have been made. And since the beginning of World War II the treatment and the cure of the mentally ill, the insane has progressed at an astounding pace. But the criminal law has failed utterly to move forward with this achievement. In this country it has with few exceptions noted remained unchanged. IT IS AS IF THOSE WHO SIT CANNOT READ." [Emphasis supplied.]

3. Mr. Justice Frankfurter in his testimony before the Royal Commission on Capital Punishment characterized the M'Naghten Rules as shams which could not be rationally justified.

4. Mr. Justice Cardozo in an address before the New York Academy of Medicine in 1928 suggested that a defense of insanity be framed which would combine efficiency with truth and not pursuant to the formula of the M'Naghten rules:

> "If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a defense which palters with reality. Such a method is neither good science nor good law."

5. The Royal Commission on Capital Punishment expressed an unfavorable opinion of the M'Naghten Rules:

> ". . . the test of responsibility laid down in England by the M'Naghten Rules is so defective that the law on the subject ought to be changed."

6. The Committee on Psychiatry and the Law of the Group for the Advancement of Psychiatry has also recommended the abolition of the M'Naghten Rules.

7. Chief Judge Biggs, in a dissenting opinion, in *United States ex rel. Smith v. Baldi,* 192 F. 2d 540, expressed disapproval when he observed that the rules compartmentalized the human mind:

> "M'Naghten Rules assume . . . the existence of . . . logic tight compartments in which the delusion holds sway leaving the balance of the mind intact . . . . The human mind however is an entity. It cannot be broken into parts, one part sane, the other part insane."

Examples from other eminent authorities' criticism of M'Naghten can be multiplied ad infinitum. Suffice it to say that M'Naghten as the sole test for criminal responsibility is in 1966 an anachronism of the worst kind.

The American Law Institute after a long exhaustive and careful study proposed a new test in its Murder Penal Code (1962):

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."
>
> § 4.01 American Law Institute Model Penal Code [final draft] [1962].

On February 28, 1966, in *United States v. Freeman,* 358 F. 2d 606 (1966), the Court of Appeals for the Second Circuit turned its back on the M'Naghten Rules as the test for criminal responsibility and adopted the A. L. I. recommendation as its criminal responsibility test.

Meanwhile, the United States Circuit Court of Appeals for the Third Circuit in *United States v. Currens,* 290 F. 2d 751, on May 1, 1961, also repudiated the M'Naghten Rules and established its own formula for determining criminal responsibility where a mentally diseased or defective person is charged with crime. The test says Chief Judge Biggs and Circuit Court Judge Forman, speaking for the court, is:

> "A person is not responsible for criminal conduct if at the time of such conduct as result of mental disease or defect he lacks substantial capacity to conform his conduct to the requirements of the law he is alleged to have violated."

Commonwealth v. Negri, 419 Pa. 117 (1965) Requires the Application of the Third Circuit Court's Currens Test as the Law of Pennsylvania on Criminal Responsibility.

Under the *Negri* decision, M'Naghten alone is no longer the law of Pennsylvania. Briefly, criminal responsibility tests are an integral part of due process and a test precluding relevant evidence from being introduced is inconsistent with due process. It appears to us that even if the issue of criminal responsibility were technically considered as *substantive* and not *procedural,* mens rea is so inexorably interconnected with fundamental due process that a federally guaranteed right within the due process clause of the Fourteenth Amendment is involved.

"While recognizing that in cases involving federal questions the Supreme Court of the United States is the ultimate arbiter, in view of the widespread confusion in this area of the law and the failure of the Supreme Court to clarify it, the decision of the Third Circuit Court of Appeals is on this matter, for all practical purposes, the ultimate forum in Pennsylvania * * *." *Commonwealth v. Negri,* 419 Pa. 117 (1965) at p. 123.

Everyone agrees that to convict an insane person of a crime would be a violation of due process of law. The M'Naghten Rules were based on scientific and medical knowledge extant in 1843. The Rules might have met due process standards then, but in the light of scientific and medical developments since 1843, the M'Naghten and only M'Naghten test does not meet minimal due process standards. To preclude testimony other than M'Naghten is to preclude a defendant from meaningfully and constitutionally raising the issue of mens rea. It can lead to the conviction of an insane person in 1966. It is, therefore, "a federally recognized right."

In *Noble v. Sigler* [8th Circuit—decided November 8, 1965], L. W. 2252, the court in discussing the determination of the mental condition of a defendant as of the time of state trial held that the federal standards of competency must be used.

In *Malloy v. Hogan,* 307 U. S. 1, the Supreme Court in discussing state invasion of rights enumerated in the first eight amendments to the constitution held that those rights are enforceable against the state through the Due Process Clause of the Fourteenth Amendment.

The court went on to say that a marked shift to the federal standards in state cases began with *Lisenba v. California,* 314 U. S. 219, and then on down through the

years to the present time as enunciated in *Malloy* to the effect that the individual's rights as guaranteed by the Fourth, Fifth and Sixth Amendments are all to be enforced against the states under the Fourteenth Amendment, according to the same standards that protect those personal rights against federal encroachment. From this the conclusion is inescapable that when a trial court as here denied the appellant the right to secure, or having secured, to present psychiatric testimony divulging the accused's total personality due process was not met. The M'Naghten rule if it prevents admission of such evidence, itself does not meet the due process test. See *Pate v. Robinson* [7th Circuit], 345 F. 2d 691.

WHEREFORE, we respectfully suggest that the petitioner was denied constitutional due process in violation of the Fourteenth Amendment of the Federal Constitution when the court insisted on using the M'Naghten formula for criminal responsibility as a sole test for criminal responsibility.

CONCLUSION.

For the foregoing reasons your petitioner prays that a Writ of Certiorari issue directed to the Supreme Court of Pennsylvania to the end that this cause may be reviewed and determined, and that the judgment of the Supreme Court of the Commonwealth of Pennsylvania be reversed as for such other and further relief as may seem proper.

Respectfully submitted,

ABRAHAM J. BREM LEVY,
JOHN A. PAPOLA,
Court Appointed Counsel for Petitioner Frank Phelan.

Of Counsel:
PETER J. LIACOURAS.

APPENDIX A.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: September 26, 1967

EAGEN, *J.*

The appellant, Frank Phelan, plead guilty generally to two separate indictments charging him with the murders of Judith Lopinson and Joseph Malito.[1] Subsequently, after a hearing before a three-judge court, he was unanimously found guilty of murder in the first degree and sentenced to death in each case. These appeals from the judgments followed.

The prime assignment of error is that during the proceedings Phelan was denied due process of law. This is bottomed upon the contention, that the cumulative effect of certain rulings in the court below was to deny him a fair trial and the effective assistance of counsel in defending the indictments.

It is established beyond argument that Phelan was entitled to the effective assistance of counsel at every critical stage of the case. See *Gideon v. Wainright,* 372 U. S. 335 (1963). And this necessarily entailed the opportunity on the part of counsel to thoroughly investigate the facts and properly prepare for trial. See *Massiah v. United States,* 377 U. S. 201 (1964), and *Powell v. Alabama,* 287 U. S. 45 (1932). Likewise, there can be no doubt that he was entitled to a fair, complete and impartial hearing before judgment was entered against him. And this necessarily included the

1. Phelan also plead guilty to an indictment charging him with conspiracy to harm and injure the victims.

opportunity of presenting every fact which was material and relevant to the issues involved. However, despite the earnest arguments of able counsel, our study of the record is not convincing that Phelan was denied any of these constitutional mandates in this case. We will, therefore, affirm the judgments.

The factual background of the case is this:

During the early morning hours of June 19, 1964, Judith Lopinson and Joseph Malito were shot to death in the basement office of Dante's Restaurant, 1809 Chestnut Street, in the City of Philadelphia. At the time Dante's was operated under a partnership agreement by Jack Lopinson (husband of Judith) and Malito.

On July 15th, after an inquest conducted by the medical examiner of the City of Philadelphia, Jack Lopinson was charged with the murders and held for action by the grand jury. Later a warrant charging Phelan with the murders issued and on July 26, 1964, after a hearing before a magistrate, he was committed to the Holmesburg Prison pending action by the grand jury.

On the evening of July 27th, Phelan summoned the senior officer at the prison and told him he wanted "to confess who committed the murders." The homicide division at police headquarters was notified and on the following morning, Phelan gave the police a recorded, factual description of the killing and the circumstances which instigated them. Therein, he admitted designedly shooting the victims at the instance of Lopinson. The taking of this statement was interrupted temporarily to permit Phelan to appear in court and testify, under oath, in a habeas corpus proceeding instituted by Lopinson. His testimony at this hearing corresponded to his statements to the police. At all times related before, Phelan was without the assistance of legal counsel.

On August 12th, John Patrick Walsh, Esq., who had been retained by the family, entered his appearance on behalf of Phelan. Mr. Walsh is a lawyer with extensive criminal trial experience and recognized by the bench and bar as one of Philadelphia's best in this area of the law.

On October 26th, Phelan appeared in court with Mr. Walsh and plead guilty generally to the two indictments charging him with the murders involved. During the proceedings and before the pleas were accepted, Phelan was personally questioned in open court as follows:

"By The Court (To Frank Phelan)

Q. Your name is Frank Phelan?

A. That's right.

Q. How old are you?

A. 25.

Q. Incidentally just for a little background. Are you a native of Philadelphia, born here?

A. I was born here.

Q. Went to school in Philadelphia?

A. Yes.

Q. How far did you go to school?

A. About nine years.

Q. When you finished school, what were you in, high school?

A. High School.

Q. Are you married or single?

A. Single.

Q. You know what is going on? You understood everything that was mentioned just now?

A. That's right.

Q. You are before me charged with a serious offense, apparently two bills of murder and two bills of conspiracy to commit murder. You know what you are here for?

A. That's right.

Q. You are represented by John Patrick Walsh, Esquire, with whom you have conferred?

A. That's right.

THE COURT: Mr. Walsh, you are here and you represent him?

MR. WALSH: Yes.

MR. SPRAGUE: Before he is arraigned, what is the plea going to be?

MR. WALSH: Guilty.

MR. SPRAGUE: Prior to that plea, may I ask the defendant a couple of questions?

THE COURT: Yes.

BY MR. SPRAGUE: (To Frank Phelan)

Q. You have discussed this case with your lawyer, Mr. Walsh?

THE COURT: Do you mind looking at the Court and at the District Attorney as he speaks to you?

FRANK PHELAN: That's right.

BY MR. SPRAGUE: (To Frank Phelan)

Q. You have discussed it with your attorney?

A. That's right.

Q. You are entering a plea of guilty here. Is this plea voluntary on your own part?

A. (No response).

THE COURT:

Q. Is it of your own free will?

FRANK PHELAN: That's right.

BY MR. SPRAGUE: (To Frank Phelan)

A. By pleading guilty you are admitting that you took part in the murder of Judy Lopinson and Mr. Malito, is that correct?

A. That is correct.

Q. Have any promises, deal or commitments or anything been made to you by anyone from the District Attorney's office?

A. No.

Q. Any promises, deals, commitments been made to by anyone representing the police department?

A. No.

Any promises, deals, commitments been made to you by anyone representing the Court?

A. No.

Q. Any promises, deals, commitments, or understandings existing between you and your lawyer, Mr. Walsh in return for this plea of guilty?

A. No.

Q. This plea is voluntary and free on your own part?

A. On my lawyer's advice.

Q. It is your own plea though?

A. That's right.

Q. And you realize that by pleading guilty if you are found guilty of first degree murder, you can be sentenced to either death in the electric chair or life imprisonment. You understand that?

A. That's right.

Q. And you desire to plead guilty, is that correct?

A. That's right."

By agreement the hearing to determine the degree of guilt was postponed indefinitely.

On January 29, February 1, 2, 1965, Phelan testified, under oath, as a Commonwealth witness in the trial of *Commonwealth v. Lopinson, supra.* Again his testimony dovetailed with his previous statements of guilt.

On July 19, 1965, Phelan filed with the court a self-handwritten petition asking that Mr. Walsh be dismissed as counsel and other counsel be appointed on his behalf. Mr. Walsh filed a contemporaneous petition asking permission to withdraw from the case on the ground that he and his client had become estranged. On July 27th, after hearing, the court permitted Mr. Walsh to withdraw as counsel and on August 2d entered an order appointing Mr. Levy and Mr. Papola, present counsel, to represent Phelan.

The rulings of the court below which, it is urged denied Phelan the effective assistance of counsel and a fair trial, were all entered subsequent to August 2d. We will now discuss each one in detail.

Following their appointment, Phelan's counsel sought the court's permission on two occasions to withdraw his pleas of guilty and enter not guilty pleas on his behalf. The requests were denied.

The first such motion was filed on October 8, 1965, nearly one year after the pleas had been entered and accepted by the court,[2] and exactly three days before October 11th, the time previously fixed for hearing to determine the degree of guilt. The second such motion was filed on October 11th.

In these motions Phelan asserted he should be permitted to withdraw the pleas of guilt, because, (1) he had not been "arraigned" on the indictments in open court; (2) at the time he entered the guilty pleas his mental and phy-

2. However, on July 27, 1965, during the hearing before the court on Phelan's request for new counsel, he did state to the court: "If the lawyer that put that guilty plea in has withdrawn, that should also be withdrawn. . . . I'm not claiming my plea was one by me."

sical condition were such that he was unable to comprehend the nature and effect of the proceedings; and, (3) of the existence of "after discovered evidence".

The court held a hearing on these motions on October 11, 1965, and afforded Phelan the opportunity of presenting any available evidence he desired in support thereof. Not an iota of evidence was submitted.[3]

The right to arraignment in open court is statutory (although it does have constitutional overtones). It consists in a reading of the indictment to the accused and calling upon him to plead thereto.[4]

The record of the plea proceedings in the instant case contains the following: "Defendant, arraigned at bar of the court, pleads guilty to Bill No. 468, Murder, and to Bill No. 469, Murder."

It is argued that since the record does not specifically show that the contents of the indictments were read to Phelan at the time, he was not validly arraigned, and the subsequent pleas were of no effect. This is devoid of merit.

First, it is the distinct recollection of the trial judge, as noted in the record, that the indictments were read to Phelan at the pertinent time. We accept this statement. Secondly, the purpose and necessity of an arraignment is to fix the identity of the accused, to inform him of the nature of the charges against him and to give him the opportunity of informing the court of his plea thereto. See 21 Am. Jur. 2d, Criminal Law § 452 (1965), and cases cited therein. See

3. Phelan's counsel insisted they were unprepared to meet the issue, because previous orders of the court denied them the opportunity of properly investigating. This will be discussed infra.

4. See Rule 317(a) Penna. Rules of Criminal Procedure (effective January 1, 1965) which states what an "arraignment" shall consist of. The definition therein is in accord with the long established understanding of the term. See 21 Am. Jur. 2d, Criminal Law § 452 (1965).

also, 4 Wharton on Criminal Law and Procedure § 1802 (1957). Due process of law does not require that any technical form of procedure be followed so long as the identity of the accused is definite, sufficient notice of the charges is given, and ample opportunity to plead afforded. See *Garland v. State of Washington,* 232 U. S. 642 (1914), and *Yodock v. United States,* 97 F. Supp. 307 (1951). The identity of the accused herein is unquestioned and, upon a reading of the record of the plea proceedings, one would have to completely distort his thinking to believe that Phelan was not fully aware of the nature of the charges lodged against him, or that he was denied ample opportunity of expressing his plea thereto. Hence, even in the absence of a reading of the contents of the indictments, all of the basic requirements of an arraignment were fully complied with in this case.

The burden of proving that Phelan did not understand the nature and effect of his guilty pleas, or there existed after discovered evidence which would warrant the withdrawal thereof was upon him. See *Commonwealth ex rel. Foeman v. Maroney,* 420 Pa. 486, 218 A. 2d 230 (1966), and *Commonwealth ex rel. Hilberry v. Maroney,* 424 Pa. 493, 227 A. 2d 159 (1967). This burden was not met. As noted before, there was no attempt to meet it, although ample opportunity was afforded.

As to the existence of after discovered evidence, it is significant that what this constituted was not set forth in the relevant motion, nor was the court below ever informed of the nature thereof. We cannot help but conclude that nothing of this character existed, and the allegation was based solely on the hope of counsel that such might somehow develop.

In the total absence of evidence to support the allegation of the existence of "after discovered evidence" or

lack of competency on the part of Phelan at the time of plea, the court very properly denied the requests to withdraw the guilty pleas. But this is not all to be considered in assessing the correctness of the court's ruling. These additional facts must be remembered: (1) That during the plea proceedings, in response to questions by the court and Commonwealth's counsel, Phelan clearly manifested a thorough understanding of the nature of the charges, the possible punishment after conviction and the fact he was admitting his guilt in open court; (2) That the pleas were entered in the presence of very competent counsel who never once during the period of several months he represented Phelan ever challenged the validity of the pleas, or even suggested his client lacked an awareness of the nature and effect thereof; (3) That the allegation Phelan lacked competency to understand at the time of plea was made for the first time nearly one year after the pleas were entered; (4) That Phelan's first admission of guilt was in the form of a truly spontaneous and volunteered statement to the police; (5) That on two accasions, other than the plea proceedings involved, Phelan appeared in court where, under oath, he publicly, unequivocally and voluntarily stated he committed the killings.

To permit the withdrawal of the pleas involved on this posture of the record would have constituted a travesty of justice.

The right to withdraw a guilty plea by a criminal defendant is not absolute. As stated in *Commonwealth v. Scoleri,* 415 Pa. 218, 247-248, 202 A. 2d 521, (1964): "The withdrawal of a plea of guilty is properly allowed (a) where it has been entered in ignorance of the nature of the crime with which defendant has been charged and the consequences of his plea, or (b) where the plea of guilty was not made freely and voluntarily, or (c) where the plea

was entered by mistake, or without the consent of the defendant, or (d) where the plea was entered by an uncounseled defendant in a homicide case, or in a felony case in which defendant was indigent or was refused counsel . . . or (e) where the plea was induced by fraud or threats or justifiable fear, or (f) where a trial or hearing Judge has made, but has not kept, a promise or commitment which induced the plea, or (g) where because of very unusual circumstances, the Court believes that Justice will best be served by submitting the case to a jury." (Original emphasis omitted.) See also, *Everett v. United States,* 336 F. 2d 979 (D. C. Cir. 1964), and *Williams v. United States,* 192 F. 2d 39 (5th Cir. 1951).

The present record contains nothing that would place the case in any of the categories delineated in *Scoleri, supra.*

Following their appointment, Phelan's present counsel requested leave of court to hire a special investigator and psychiatric experts to examine their client. These motions were denied.[5] It is urged that these rulings denied counsel the necessary tools with which to effectively represent their client.

As stated before herein, Phelan's counsel were clearly entitled to investigate and ascertain all facts incident to the case and to properly prepare to meet all issues that might arise during hearings in connection therewith. And since Phelan was indigent, the trial court was empowered to authorize at county expense, the utilization of the services of experts, such as those requested, to assist in the preparation and presentation of his cause. See Act of March 22, 1907, P. L. 31, as amended, 19 P. S. § 784. And while, at first blush, it might appear that the court's denial

5. On October 13th, following the conclusion of the hearing held to determine the degree of guilt, the court did authorize the hiring of an investigator. This, of course, was too late to help counsel in the preparation for any hearings concerned herein.

of permission to hire the experts requested constituted an abuse of discretion and, more importantly, a deprivation of the constitutional right to the effective assistance of counsel, a careful consideration of all the pertinent facts compels a contrary conclusion.

As noted before, present counsel were appointed on August 2, 1965. The hearing to determine the degree of guilt was conducted on October 13th. The hearing to fix the punishment proceeded on October 15th.

Through the services of the investigator requested, it appears from the briefs filed in this Court that counsel wished to investigate rumors that Phelan's admissions of guilt, his testimony in the related case involving Lopinson, and his own pleas of guilty in court were the result of improper police practices following his arrest, including the administering of drugs. In all of the varied motions filed below, it is noteworthy there is a total absence of any assertion that Phelan's pleas of guilty were coerced, unlawfully induced, or in any sense involuntarily entered. Additionally, during his testimony in the Lopinson trial, Phelan was vigorously cross-examined as to his treatment by the police during his confinement and his use of drugs. He categorically denied that his admissions of guilt or testimony against Lopinson were induced by any conduct on the part of the police or by the use of drugs. Also, at the hearing on the motions to withdraw the pleas, Phelan did not testify or change his story in this respect.

Furthermore, following their appointment, Phelan's counsel were given full access to (1) the record of the Lopinson trial which included Phelan's own testimony concerning the facts which were to be the subject of the further investigation, and a detailed record of all drugs and medications administered to Phelan during the period of confinement, from the date of arrest to to Lopinson trial;

(2) copies of all statements Phelan made to the police during his confinement; and, (3) the complete record kept at Holmesburg Prison concerning Phelan's confinement, including the reports of several medical examinations and the time and date any drugs or medication were made available to him.

In view of all the facts enumerated above, and the limited purpose for which the services of the proposed investigator was sought, we are not persuaded that counsels' effectiveness was in any sense curtailed by the challenged order of the court below.

The request for permission of the court to retain psychiatrists to examine Phelan on behalf of the defense was first made on October 11, 1965. The purpose given was to ascertain the competency of Phelan to understand his pleas of guilty entered as of October 26, 1964. In fact, in answer to questions of the court, defense counsel specifically stated it was not for the purpose of deciding if Phelan could then stand trial.

When this motion was made, Phelan's counsel were already in possession of a report, dated October 24, 1964, from Dr. Robert Leopold, and another, dated December 24, 1964, from Dr. Kenneth Appel, both eminent psychiatrists, given as a result of examinations made at the request of Mr. Walsh, Phelan's previous counsel. Both reports stated the opinion, inter alia, that Phelan was suffering from a chronic, progressive schizophrenia and a compulsion to kill. However, it was also opined therein that he could distinguish between right and wrong, and nothing therein indicated he lacked the understanding to know the nature or quality of his acts. Also available to defense counsel, as of this date, were the reports of psychiatrists and other physicians who had examined Phelan at the request of the prison officials or the prosecuting authorities.

Two days later on October 13th, counsel renewed the motion for permission to retain the services of psychiatrists to examine Phelan. However, this time the purpose advanced was to inquire into his ability to stand trial. The motion was refused. However, the court simultaneously stated that if after hearing the testimony available in the case, it was deemed necessary that further psychiatric examinations be pursued, it would order such to take place. At trial the court was given the benefit of extensive testimony resulting from psychiatric examinations of Phelan. While Phelan did not testify personally, the court also had the opportunity of observing him throughout the proceedings, and noted of record his apparent knowledgeable attention and active cooperation with his counsel. As a further indication of Phelan's ability to stand trial, he signed the motion asking permission to withdraw the guilty pleas in open court on October 11th, and in response to questions readily answered that he read the motion and understood it.

In view of all these facts, we are not convinced that the court abused its discretion or unduly proscribed counsels' effectiveness in refusing to order additional psychiatric tests. Citing *Pate v. Robinson,* 383 U. S. 375 (1966), it is argued that if a "bona fide doubt" existed as to Phelan's competence to stand trial, it was mandatory upon the court to order an independent determination of his sanity. The ruling in *Robinson* was based upon the requirements of a specific statute of the State of Illinois: *Pate v. Robinson,* supra, at 385. More importantly, the evidence in this record warrants no such doubt.

During the hearing to determine the degree of guilt, the court refused to admit medical testimony tending to establish that at the time of the commission of the crimes Phelan lacked the mental ability to form the intent to kill,

a necessary ingredient of first degree murder, and lacked substantial capacity to confrom his conduct to the requirements of the law. This was not error. See *Commonwealth v. Ahearn,* 421 Pa. 311, 218 A. 2d 561 (1966), and *Commonwealth v. Woodhouse,* 401 Pa. 242, 164 A. 2d 98 (1960). As stated in *Commonwealth v. Ahearn,* supra, at 324, 218 A. 2d 568, such evidence is not admissible "(1) to absolve or exculpate and acquit a defendant of crime, or (2) to prove a lack of specific intent to kill, and thereby prohibit a verdict of murder in the first degree." See also, *Commonwealth v. Carroll,* 412 Pa. 525, 194 A. 2d 911 (1963). Moreover, this testimony was properly received in evidence and considered by the court in mitigation of the penalty during the hearing to determine the sentences to be imposed.

Finally, we find no abuse of discretion or denial of due process of law in the court's ruling of October 11, 1965, refusing a continuance of the hearings.

Judgments affirmed.

Mr. Chief Justice Bell filed a concurring opinion.

Mr. Justice Roberts filed a dissenting opinion.

Mr. Justice Cohen dissents.

APPENDIX B.

CONCURRING OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

BELL, *C. J.* September 26, 1967.

I join in the excellent Opinion of the Court written by Justice EAGEN. The lower Court correctly admitted in evidence and the majority Opinion correctly holds that the testimony of defendant's psychiatrists, who admitted defendant knew the difference between right and wrong, was not admissible for the purpose of determining innocence or guilt, but was admissible in considering the sentence or penalty: *Commonwealth v. Ahearn,* 421 Pa. 311, 218 A. 2d 561.

For many years, psychiatrists have attempted to change the law involving murder and are constantly adopting different psychiatric ideas and terminology to express and justify their beliefs that a criminal is a sick person but not a criminal. As this Court said in *Commonwealth v. Ahearn,* 421 Pa., supra (pp. 320, 321, quoting from *Commonwealth v. Tyrrell,* 405 Pa. 210, pp. 219, 221):

" 'The doctrine of "irresistible impulse" or in the modern psychiatric vernacular "inability to control one's self", whether used to denote legal insanity, *or as a device to escape criminal responsibility for one's acts or to reduce the crime or its degree, has always been rejected in Pennsylvania.* . . . "Certainly neither social maladjustment, *nor lack of self-control,* nor impulsiveness, nor psychoneurosis, *nor emotional instability,* nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal-law conception of that term." [Emphasis in original]' "

As Chief Justice HORACE STERN so pertinently said in *Commonwealth v. Neill,* 362 Pa. 507, 67 A. 2d 276, where the Court rejected the defense that confusional insanity amounted to legal insanity (pp. 513-514, 514-515): "Apart from the fact that 'confusional insanity' is apparently an antiquated and discarded theory and that the proposition that there could be such a thing as a momentary insanity was sharply challenged by an expert witness for the Commonwealth, it would seem quite obvious that defendant's witness failed to differentiate between a mere temporary frenzy or emotional excitation, and insanity within the legal meaning of that term, namely, inability, from disease of the mind, to understand the nature and quality of the act and to distinguish between right and wrong with respect to it: Commonwealth v. Szachewicz, 303 Pa. 410, 416, 417, 154 A. 483, 484, 485; Commonwealth v. Lockard, 325 Pa. 56, 60, 188 A. 755, 757.

". . . Certainly neither social maladjustment, nor lack of self-control, nor impulsiveness, nor psychoneurosis, nor emotional instability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal-law conception of that term."

The dissenting Opinion proves too much, so much in fact that it disproves its own theory. It completely overlooks or completely ignores the testimony of defendant's psychiatrists, who admit defendant knew the difference between right and wrong and the legal consequences of his criminal actions. They testified that "He told us that his feelings of needing to kill had been present for as long as he could remember. He regrets that he was not in the Marine Corps during the war because he said that he would have felt better if he could have killed twelve or fifteen people. . . . He is a thoroughly dangerous human being who . . . can be expected to kill at any time that he is under . . . sufficient emotional pressure . . . and his sick-

ness of mind is so strong that he is not free to act . . . before the strength of his destructive almost animalistic drive and almost delight in killing." How can the dissenting Opinion ignore this testimony! How can the dissenting Opinion argue that defendant did not have the ingredient and hallmark of a nonfelony first degree murder, viz., a specific intent to kill, just because his intent to kill was uncontrollable!

I express, with great restraint, my conviction that the psychiatric test advocated in the dissenting Opinion (1) would turn over to psychiatrists, instead of to Courts and juries, the determination of criminal responsibility and murder, and (2) would whitewash and release nearly every murderer, and (3) would make the safety and protection of law-abiding citizens from the (admittedly) most dangerous killers—i.e., those whom the psychiatrists say have an uncontrollable urge to kill—a travesty.

APPENDIX C.

DISSENTING OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: September 26, 1967

ROBERTS, *J.*

I can only reiterate what I said in *Commonwealth v. Ahearn,* 421 Pa. 311, 331, 218 A. 2d 561, 571 (1966):

> "It is a commonplace that hard cases make bad law, yet it is one that we need remember. There can be no doubt that this Court is now faced with a hard case. Unfortunately, in my opinion, the result reached represents bad law. Despite the brutality of the crime, despite the overwhelming evidence of the existence of the elements of murder in the first degree, despite my own evaluation of the psychiatric testimony here in dispute, I must dissent. In my view, the majority unwisely restricts the purpose for which psychiatric evidence may be admitted, and thereby binds the courts of this Commonwealth to a rule which is contrary to enlightened authority."

In an attempt to demonstrate that appellant lacked the specific intent to kill which is a necessary ingredient of a first degree non-felony murder conviction, counsel offered several reports by eminent psychiatrists. Consistent with the *Ahearn* decision, the court below acting as the fact-finder refused to admit this medical testimony on the specific intent issue although it did accept this evidence in mitigation of penalty.

The report of Dr. Robert L. Leopold contained the following characterization of appellant:

> "From the psychiatric standpoint, there is no question whatsoever in our [Dr. Leopold and Dr. M. Lawrence Spoont] minds that this man is suffering from severe, chronic, progressive schizophrenia. He is impulse-ridden, delusional, hallucinatory, and without insight. We desire to stress that he is a thoroughly dangerous human being who has no control whatsoever over his own aggression and who, because of his paranois [sic], can be expected to kill at any time that he is under what for him is sufficient emotional pressure.
>
> . . .
>
> "We are aware that the McNaughton [sic] formulation of criminal insanity includes only the concept of whether a man knows the difference between right and wrong. On an intellectual level, Frank Phelan can make this distinction. It is, however, meaningless to him because such an intellectual concept is overwhelmed totally by his psychotic needs."

Dr. Kenneth E. Appel, Emeritus Professor of Psychiatry at the University of Pennsylvania, concluded:

> "He can say the words right and wrong, he can tell the legal consequences of criminal actions, such as murder, but his pathology or sickness of mind is so strong that he is not free to act under such concepts and considerations—they are irrelevant, purely verbal and impotent before the strength of his destructive almost animalistic drive and almost delight in killing.
>
> "The diagnosis is mental disease—Severe Intense Paranoid *Schizophrenia,* in my opinion—with delu-

sions of grandeur, persecution and compulsion to kill." (Emphasis in original.)

Hornbook law tells us that relevant evidence is admissible evidence. Professor McCormick has succinctly stated: "[T]he most acceptable test of relevancy is the question, does the evidence offered render the desired inference *more probable than it would be without the evidence?* . . . . Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible." McCormick, Evidence § 152, at 318-19 (1954). (Emphasis in original.) Certainly, the two psychiatric reports quoted above advance the inquiry as to whether Phelan had the requisite specific intent and make it more probable that he did not than it would be without the evidence. The M'Naghten rule, which formed the basis for exclusion of similar evidence in *Ahearn,* is nowise an evidentiary test; devised to establish a standard of the degree of mental impairment necessary to render a defendant not criminally responsible, it should not be employed to restrict the scope of relevant evidence on an entirely distinct issue, *i.e.,* specific intent to kill.

The *Ahearn* decision was, in fact, a departure from prior Pennsylvania law—a departure I could not sanction then and cannot now. In several of the cases cited by the *Ahearn* majority on the admissibility issue, the lower court *did* permit the psychiatrist to give his expert opinion as to the defendant's state of mind. See *Commonwealth v. Carroll,* 412 Pa. 525, 194 A. 2d 911 (1963); *Commonwealth v. Jordan,* 407 Pa. 575, 181 A. 2d 310 (1962); *Commonwealth v. Tyrrell,* 405 Pa. 210, 174 A. 2d 852 (1961); *Commonwealth v. Woodhouse,* 401 Pa. 242, 164 A. 2d 98 (1960); *Commonwealth v. Neill,* 362 Pa. 507, 67 A. 2d 276 (1949). In each of these cases we merely questioned the weight to be accorded such evidence and did not rule that the evidence was inadmissible.

The vice of the majority's position is self-evident. It has been rejected in other M'Naghten jurisdictions [1] and by the American Law Institute.[2] So long as a specified mental state forms one of the elements of first degree non-felony murder, this Court should not deprive the factfinder of relevant, possibly probative, evidence. To ignore the contribution psychiatry can make to the reliability of verdicts is to retreat from the Twentieth Century.

I am compelled to dissent.

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1. *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677, 35 Cal. Rptr. 77 (1963) (Traynor, C. J.); *Battalino v. People*, 118 Colo. 587, 199 P. 2d 897 (1948); *State v. Gramenz*, 256 Iowa 134, 126 N. W. 2d 285 (1964); *State v. Dipeolo*, 34 N. J. 279, 168 A. 2d 401 (1961) (Weintraub, C. J.). Rejection of the majority's restrictive view is not of totally recent origin. See *Anderson v. State*, 43 Conn. 514 (1876); *People v. Moran*, 249 N. Y. 179, 163 N. E. 553 (1928); *State v. Green*, 78 Utah 580, 6 P. 2d 177 (1931); *Dejarnette v. Commonwealth*, 75 Va. 867, 800 (1881) (dictum).

2. A. L. I. Model Penal Code, § 4.02(1) (Official Draft, 1962).

APPENDIX D.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA.

November 24, 1967. Appellant's Petition for Reargument denied.

PER CURIAM.